Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID SCHNEIDER,

Petitioner,

vs.

GORDON R. ENGLAND,
SECRETARY OF THE NAVY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a "mixed case," involving both whistleblower retaliation and discrimination claims, an aggrieved employee can file a complaint with the employing agency's equal employment office. In turn, 5 U.S.C. § 7702 provides that "[t]he decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the [Merit Systems Protection] Board."

The question presented here is whether the district court has jurisdiction to hear a mixed whistleblower retaliation and discrimination action even though the plaintiff did not first seek administrative review by the M.S.P.B. of his whistleblower retaliation claim.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding are David Schneider ("Petitioner") and Gordon R. England, Secretary of the Navy ("Respondent").

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Schneider respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case filed on June 25, 2002.

OPINION BELOW

The district court's order dismissing petitioner's action for lack of subject matter jurisdiction is not published. This unpublished order is reprinted in the Appendix to this Petition at pages 24-28. The Ninth Circuit Court of Appeal's unpublished opinion affirming is reprinted in the Appendix at pages 1-2.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on June 25, 2001. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(1). Federal subject matter jurisdiction is proper under 5 U.S.C. §§ 2302, 7702-7703; 28 U.S.C. § 1391.

RELEVANT PROVISION INVOLVED

Title 5 U.S.C. § 7702 provides in relevant part:

> (a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who –

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by –

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves–

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection; the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the

employee appeals the matter to the Board under paragraph (1) of this subsection.

STATEMENT OF THE CASE[1]

Petitioner filed a "mixed claim" action with the Navy Equal Employment Office ("E.E.O."), alleging he was terminated both for whistleblowing and because of a disability. When the E.E.O. failed to issue a timely determination, Petitioner filed an action in the district court, alleging he was involuntarily discharged from his position at the Naval Weapons Test Squadron, Point Mugu, formerly known as the Targets Directorate, Aircraft Targets Division, Aircraft Targets Maintenance/Support Branch, Pacific Missile Test Center, Point Mugu. Pet. App. 3-13.

Petitioner claimed his discharge was improper for two reasons. First, he alleged that he was terminated in reprisal for reporting safety violations and other problems – i.e. "whistleblowing" – to the Office of the Inspector General and Office of Special Counsel. See 5 U.S.C. § 2302 (the Whistleblower Protection Act or "W.P.A."); Pet. App. 9-10. Second, he alleged he was improperly discharged because of a disability in violation of Section 501 of the Rehabilitation Act of 1993. See 29 U.S.C. § 791; Pet. App. 10-11.

[1] This appeal arose following the granting of Respondent's motion to dismiss. Pet. App. 24-28. In assessing a motion to dismiss for lack of subject matter jurisdiction, the properly pled factual allegations of the plaintiff's complaint are presumed to be true, and all inferences are taken in favor of the plaintiff. *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27 (1st Cir. 1996).

The district court entered partial summary judgment against Petitioner on his disability claim because it concluded he had not established a prima facie case of handicap discrimination. See Pet. App. 15. The district court then granted a motion to dismiss Petitioner's whistleblower claim because he had failed to first bring his claim to the Office of Special Counsel. See Pet. App. 15-16.

In November 1999, the court of appeals affirmed the grant of summary adjudication as to Petitioner's disability claim. Pet. App. 15. The court, however, reversed on Petitioner's whistleblower claim, finding that he had properly filed a "mixed complaint" and exhausted his administrative remedies. Pet. App. 15-16. As belatedly conceded by Respondent, Petitioner was not required to bring his claim first to the Office of Special Counsel. Pet. App. 15.

On remand, in May 2000, Respondent filed a motion to dismiss for lack of subject matter jurisdiction because, among other things, Petitioner failed to seek administrative review by the M.S.P.B. of his nondiscrimination claim. The district court denied Respondent's motion to dismiss. Pet. App. 17-23.

In September 2000, Respondent filed another motion for summary judgment. Respondent based its motion on the sole ground that "[Petitioner] could not claim protection as a 'whistleblower,' because, prior to the time [Petitioner] made his alleged disclosures, [Respondent] was already aware of the situation . . . ." Nonetheless, while not arguing it as a basis for summary judgment, Respondent noted that the district court lacked subject matter

jurisdiction because Petitioner had failed to seek administrative review by the M.S.P.B. of his nondiscrimination claim.

The district court never ruled on Respondent's motion for summary judgment. Rather, on its own motion for reconsideration, the district court dismissed Petitioner's action for lack of subject matter jurisdiction. Pet. App. 24-28. The district court so ruled because Petitioner had "failed to exhaust his administrative remedies with respect to his nondiscrimination claim because he failed to appeal to the MSPB before filing this case in the District Court." Pet. App. 25.

The Ninth Circuit Court of Appeals affirmed. Pet. App. 1-2. It did so even though every other circuit to consider this issue has resolved that the plain language of 5 U.S.C. § 7702 makes clear that following an adverse agency decision, the employee has the option in a "mixed case" complaint of filing a civil action in the district court rather than appealing to the M.S.P.B. See e.g., *Wells v. Shalala*, 228 F.3d 1137, 1142 (10th Cir. 2000); *Doyal v. Marsh*, 777 F.2d 1526, 1535-36 (11th Cir. 1985); *Quinn v. West*, 140 F.Supp.2d 725, 734 (W.D. Tex. 2001).

The Ninth Circuit explained its ruling as follows:

> "David Schneider brought this mixed claim action against the Secretary of the Navy on the bases that he had been discriminated against on account of a disability and that he had been retaliated against for whistleblowing. At an earlier time, the district court granted summary judgment to the Secretary on the discrimination claim. We affirmed. Schneider now appeals the district court's later dismissal of the nondiscrimination (whistleblower) claim. The dismissal

was based upon Schneider's failure to exhaust his administrative remedies. We affirm.

"There can be no doubt that Schneider failed to present his whistleblower retaliation claim to the Merit Systems Protection Board (MSPB) before he brought his mixed claim action in the district court. Thus, he has not preserved that claim for judicial review. *See Sloan v. West*, 140 F.3d 1255, 1259-1260 (9th Cir. 1998); *see also Nater v. Riley*, 114 F.Supp.2d 17, 24 (D.P.R. 2000), *aff'd*, 2001 WL 828290 (1st Cir. July 23, 2001) (unpublished disposition), cert. denied, ___ U.S. ___, 122 S.Ct. 1544 (2002). Indeed, when an employee bypasses the MSPB, federal courts cannot possibly apply the proper deferential standard of review to the agency's action on a nondiscrimination claim." (Footnotes omitted.) Pet. App. 1-2.

REASONS FOR GRANTING THE WRIT

In its decision, the United States Court of Appeals for the Ninth Circuit held that Petitioner had failed to preserve his mixed claim action for judicial review in the district court because he had not first presented his whistleblower retaliation claim to the M.S.P.B. Pet. App. 2. As we now explain, this decision creates an intercircuit conflict which threatens the consistency of federal law and should be settled by this Court. See, e.g., Sup. Ct. R. 10(a); *TRW Inc. v. Andrews,* 534 U.S. 19, 122 S.Ct. 441, 446 (2001); *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602 (2001) (Certiorari granted to review unpublished *per cruiam* opinion to resolve intercircuit conflict).

When a federal employee claims he is aggrieved under the W.P.A., he does not have the right to seek relief directly in federal district court. In a "mixed case," involving both whistleblower and discrimination claims, the aggrieved employee can either (1) file a complaint with the employing agency's E.E.O. department, or (2) seek administrative relief from the agency's action directly in the M.S.P.B. 5 C.F.R. § 1201.154, subd. (a); 29 C.F.R. § 1614.302, subd. (b); see also *Sloan v. West*, 140 F.3d 1225, 1259 (9th Cir. 1998); *McAdams v. Reno*, 64 F.3d 1137, 1141 (8th Cir. 1995). A "mixed case" complaint may not, however, be filed in both places at once. 5 U.S.C. § 7702; 29 C.F.R. § 1614.302, subd. (b).

Further, under 5 U.S.C. § 7702, subdivision (a)(2)(B) "any matter" which involves "any issue of discrimination" shall be resolved by the appropriate agency. That section further provides, "[t]he decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the [Merit Service Protection] Board." 5 U.S.C. § 7702, subd. (a)(2)(B). "Thus, the plain language of § 7702(a)(2)(B) provides that if an employee alleges disability discrimination . . . as a basis for agency action, he may either file suit in the district court *or* pursue an administrative procedure after an adverse agency decision." *Wells v. Shalala, supra,* 228 F.3d at 1142, emphasis in original.

As such, "following an adverse agency decision, the employee has the option in a 'mixed case' complaint of filing a civil action in the district court rather than appealing to the MSPB." *Wells v. Shalala, supra,* 228 F.3d at 1143; see also, e.g., *Quinn v. West, supra,* 140 F.Supp.2d at 734; Burdens of Proving Handicap Discrimination Using Federal Employment Discrimination Law: Rational Basis

or Undue Burden, 1989 Det. C.L. Rev. 1053, 1071 ("When an employee presents a claim of discrimination before the district court, the court has jurisdiction over the civil service claim even if the civil service claim has not been presented to the [Merit System Protection] Board").

The Eleventh Circuit reached this same conclusion in *Doyal v. Marsh,* 777 F.2d 1526 (11th Cir. 1985). As the *Doyal* Court explained:

> "If an employee does not allege that 'a basis' of the agency action was discrimination, he may appeal an agency decision directly to the MSPB and from the MSPB to the courts of appeals or the Court of Claims. If, however, the employee does allege discrimination, he may *either* immediately file suit in a district court *or* pursue an administrative procedure. . . . Therefore, Congress . . . has explicitly given the employee certain rights and options, one of which is to file a civil action based on his mixed case complaint before resorting to the MSPB." *Id.,* at pp. 1535-36, original emphasis; see also *Mullins v. Cromwell,* 228 F.3d 1305, 1312 (11th Cir. 2000).

The conclusion that an appeal to the M.S.P.B. is not a prerequisite to filing an action in the district court makes sense. As the court of appeals recognized in *Christo v. Merit Systems Protection Board,* 667 F.2d 882, 883 (10th Cir. 1981), "the various statutory provisions of the Act and its legislative history indicate a clear Congressional preference for combining various aspects of a single agency determination under one review proceeding, both in the administrative and judicial channels." See also *Wall v. United States,* 871 F.2d 1540, 1545-46 (10th Cir. 1989) (Seymour, J., dissenting) (To obtain judicial review in a "mixed case," an employee may file suit in federal district

court after final agency action, "whether the final agency action consists of resolution of a mixed case by the Board, or rejection of the claim by claimant's agency").

To force a plaintiff to bifurcate his case and return to the administrative process for further consideration of his retaliation claim would frustrate principles of judicial economy and serve no useful purpose. See *Woodman v. Runyon,* 132 F.3d 1330, 1342 (10th Cir. 1997); cf. *Tolliver v. Deniro,* 790 F.2d 1394, 1396 (9th Cir. 1986) (For reasons of judicial economy, interests of the litigants and legislative history, the Court of Appeals refused to bifurcate improper discharge claims from racial discrimination claims).

Here, Petitioner's action was "mixed" because he alleged both discrimination and whistleblowing. As such, following the adverse E.E.O. decision, Petitioner could either file suit in the district court, as he did, or pursue an administrative procedure. Thus, Petitioner properly brought his action in the district court. *Wells v. Shalala,* 228 F.3d at 1142-43.

In reaching its contrary conclusion, the Ninth Circuit cites *Sloan v. West, supra,* 140 F.3d 1255 and *Nater v. Riley,* 114 F.Supp.2d 17 (D.P.R. 2000) as holding that the district court lacked subject matter jurisdiction to hear Petitioner's whistleblower retaliation claim because that claim had not first been presented to the M.S.P.B. Pet. App. 2. The Ninth Circuit reliance on *Sloan* and *Nater* is problematic for two reasons: First, while *Sloan* generally discusses the "jurisdictional Gordian knot formed when Title VII and civil service administrative claims are interlaced" (*id.,* at 1257), neither it nor *Nater* addresses the procedure where an aggrieved employee's mixed case is filed in the district court in lieu of an appeal to the

M.S.P.B. As such, neither *Sloan* nor *Nater* provides authority for the requirement that Petitioner had to file an appeal to the M.S.P.B. before filing his action in district court. Second, reading *Sloan* and *Nater* in this manner is irreconcilable with the decisions in *Wells v. Shalala, supra*, 228 F.3d 1137; *Doyal v. Marsh, supra*, 777 F.2d 1526; and *Quinn v. West, supra*, 140 F.Supp.2d 725.

In sum, this Court should grant certiorari to resolve the intercircuit conflict and eliminate uncertainty in the interpretation of 5 U.S.C. § 7702.

CONCLUSION

For the foregoing reasons, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: September 18, 2002

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVE SCHNEIDER, Plaintiff-Appellant, v. GORDON R. ENGLAND,** Secretary of the Navy, Defendant-Appellee.	No. 01-55941 D.C. No. CV-96-06665-MRP **MEMORANDUM*** (Filed June 25, 2002)

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Submitted June 7, 2002***
Pasadena, California

Before: FERNANDEZ, WARDLAW, and W. FLETCHER, Circuit Judges.

David Schneider brought the mixed claim action against the Secretary of the Navy on the bases that he had been discriminated against on account of a disability and that he had been retaliated against for whistleblowing. At

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Gordon R. England is substituted for John H. Dalton, Secretary of the Navy, pursuant to Fed. R. App. P. 43(c)(2).

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

an earlier time, the district court granted summary judgment to the Secretary on the discrimination claim. We affirmed.[1] Schneider now appeals the district court's later dismissal of the nondiscrimination (whistleblower) claim. The dismissal was based upon Schneider's failure to exhaust his administrative remedies. We affirm.

There can be no doubt that Schneider failed to present his whistleblower retaliation claim to the Merit Systems Protection Board (MSPB) before he brought his mixed claim action in the district court. Thus, he has not preserved that claim for judicial review. *See Sloan v. West*, 140 F.3d 1255, 1259-60 (9th Cir. 1998); *see also Nater v. Riley*, 114 F. Supp. 2d 17, 24 (D.P.R. 2000), *aff'd*, 2001 WL 828290 (1st Cir. July 23, 2001) (unpublished disposition), *cert. denied*, ___ U.S. ___, 122 S. Ct. 1544 (2002). Indeed, when an employee bypasses the MSPB, federal courts cannot possibly apply the proper deferential standard of review[2] to the agency's action on a nondiscrimination claim.

AFFIRMED.

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[1] *Schneider v. Dalton*, No. 98-55281, 1999 WL 1079628, at *1 (9th Cir. Nov. 30, 1999) (unpublished disposition).

[2] *See Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID SCHNEIDER, **Plaintiff,** **vs.** **JOHN H. DALTON, SECRETARY OF THE NAVY,** **Defendant.**	**CASE NO. CV 96-6665 MRP (Mcx)** **FIRST AMENDED COMPLAINT FOR DAMAGES** **(Filed Feb. 3, 1997)**

Plaintiff, for his complaint against Defendant, alleges:

Jurisdiction and Venue

1. This action is brought pursuant to and jurisdiction is conferred on this Court by the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.). Plaintiff further invokes this Court's jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Plaintiff also invokes this Court's jurisdiction under the Declaratory Judgment Act 28 U.S.C. §§ 2201 and 2202.

2. The venue of this action is properly placed in the United States District Court, Central District of California,

pursuant to 28 U.S.C. § 1391 because Plaintiff's claims arise in this district.

Parties

3. Plaintiff David Schneider is a citizen of the United States who resides in Camarillo, Ventura County, California.

4. Defendant John H. Dalton is the Secretary of the Department of the Navy, an employee within the meaning of 42 U.S.C. §§ 2000e (a) and (b).

Statement of the Case

5. Plaintiff began working for the Department of the Navy on November 18, 1990, at the Targets Directorate, Aircraft Targets Division, Aircraft Targets Maintenance/Support Branch, Pacific Missile Test Center, Point Mugu. This activity subsequently merged with the Aircraft Maintenance Department and eventually became the Naval Weapons Test Squadron, Point Mugu. Plaintiff continued to work there until January 11, 1996, when he was involuntarily discharged from his position in reprisal for making complaints to the Office of the Inspector General and for medical unavailability to perform duties due to disability.

6. On or about January 25, 1996, Plaintiff had his first contact with an EEO counselor regarding his discharge from his employment. Plaintiff's final contact with an EEO counselor was on or about February 15, 1996.

7. Plaintiff filed a formal EEO complaint on or about February 21, 1996, contending he had been wrongly

discharged from his employment with the Navy as reprisal for reporting safety violations and because of disability in violation of Section 501 of the Rehabilitation of Act of 1993. On June 7, 1996, Plaintiff's complaint was accepted for investigation.

8. More than 180 days have now passed since Plaintiff filed his formal EEO complaint, and no final decision has been issued. Since 180 days have now passed since Plaintiff filed his formal EEO complaint, Plaintiff elects to file this civil action.

Statement of Facts

9. Plaintiff began working at the Targets Directorate, Aircraft Targets Division, Aircraft Targets Maintenance/Support Branch, Pacific Missile Test Center, Point Mugu, on November 18, 1990, and was assigned to the Aircraft Targets Maintenance/Support Branch. It soon became obvious to Plaintiff that certain personnel in the Aircraft Targets Maintenance/Support Branch were not qualified to perform the work they were in fact performing. Plaintiff stated to management and others that certain personnel were unqualified. Immediately thereafter Plaintiff began being harassed by management. This harassment included Plaintiff being assigned duties that were degrading and menial and experiencing unreasonable delays in receiving mandatory ordnance certification.

10. Management's harassment of Plaintiff included an unwarranted and unfounded Letter of Caution on August 20, 1992. Plaintiff filed a grievance and on September 15, 1992, management agreed to rescind the Letter of Caution to avoid harassment in the future.

11. On October 12, 1992, Plaintiff filed a complaint with the Office of the Inspector General regarding violations of OPNAVINST 4790.2E, including the use of unqualified personnel. In response to this complaint, a special audit of Aircraft Targets Maintenance Office (ATMO) was performed on February 22, 1993. This audit confirmed Plaintiff's allegations by finding that certain personnel lacked required education and training.

12. As a result of Plaintiff's October 12, 1992 complaint to the Office of the Inspector General, management's harassment of Plaintiff increased. In particular, management began harassing Plaintiff by insisting that he train certain unqualified personnel who were not graduates of AME school. Plaintiff believes that management's purpose in asking him to train unqualified personnel was to force him to violate Navy regulations so that he could no longer complain when management violated them.

13. On May 13, 1993, Plaintiff received a Letter of Caution dated May 12, 1993, for refusing to train unqualified personnel. Plaintiff's reason for refusing to train these personnel was based on the fact that they lacked experience and were not graduates of the required AME school as per OPNAVINST 4790.2E. Requiring Plaintiff to train unqualified personnel was retaliation for Plaintiff's complaint to the Office of the Inspector General in October 1992.

14. Plaintiff had for some time suffered from a mild case of agoraphobia, particularly when combined with height, but the constant harassment severely aggravated this condition which affected Plaintiff's ability to perform his job duties and caused Plaintiff to seek professional medical assistance.

15. As a result of management's continuing harassment and in particular the May 12, 1993, Letter of Caution, Plaintiff requested a transfer. On June 28, 1993, Plaintiff was transferred to the Intermediate Maintenance Activity (IMA) Quality Assurance Branch. At the time of this transfer, Plaintiff was advised that he would be transferred back to ATMO if he ever caused another problem such as the complaint he filed with the Office of the Inspector General in October 1992.

16. From June 28, 1993, until February 5, 1995, Plaintiff worked at the IMA Quality Assurance Branch without being subjected to the intense harassment he had been subjected to at ATMO. The result of this lack of harassment was that Plaintiff's agoraphobia became much more manageable. All of Plaintiff's performance appraisals during this period of time stated that his performance was at level 4 "Exceeds Fully Successful." In addition, on March 31, 1994, Plaintiff was given a Special Achievement Award which included a cash incentive award.

17. An inspection at ATMO was performed in May 1994 by the Naval Aviation Maintenance Office. Among the discrepancies uncovered during this inspection was the lack of qualified personnel as previously reported by Plaintiff.

18. In December 1994, Plaintiff filed a complaint with the Office of the Special Counsel setting forth certain problems in the workplace at ATMO in violation of 5 U.S.C. §§ 2302, commonly called reprisal for whistle blowing.

19. On February 5, 1995, in response to Plaintiff's complaint to the Office of Special Counsel in December 1994, management transferred Plaintiff back to ATMO

where he had previously been subjected to intense harassment and solely for the purpose of retaliating against Plaintiff for making the December 1994 complaint to the Office of Special Counsel. Plaintiff was informed of the transfer under circumstances, a meeting with seven other individuals present, designed to intimidate and harass Plaintiff. After being transferred back to ATMO, Plaintiff was placed in the same hostile, stressful environment and was assigned menial duties outside of his classification. In order to further harass and isolate Plaintiff, management instructed Plaintiff not to talk to any of his fellow workers about his personal opinions.

20. The harassment and resulting stress experienced by Plaintiff after his transfer back to ATMO was so severe that he again began suffering severe physical and mental symptoms, including agoraphobia, requiring additional treatment by a physician and a psychiatrist.

21. On August 24, 1995, Plaintiff received a 5-day suspension. The stated reasons for this suspension were the intentional bumping of a fellow employee, the use of obscene language, and the failure to wear safety shoes. These alleged incidents were either fictitious or greatly exaggerated, and even if true the penalty, a 5-day suspension, was clearly excessive. The sole purpose of this 5-day suspension was to further harass and intimidate Plaintiff.

22. On January 11, 1996, Plaintiff was removed from his position as Quality Assurance Specialist with the Naval Air Warfare Center Weapons Division, Point Mugu, California. The stated reasons for this removal were the use of obscene language to a secretary and medical inability to perform duties. In truth, Plaintiff was removed from his position in reprisal for alleging Title VII violations at

various times, including October 1992 and December 1994, and because of Plaintiff's disability.

First Claim for Relief

Retaliatory Discharge

5 U.S.C. § 2302

23. Plaintiff duly and faithfully performed his job with the Navy in a satisfactory manner. Plaintiff rightfully refused to ignore violations of Navy instructions and/or regulations and rightfully refused to train unqualified personnel. Because management wanted Plaintiff to ignore violations of Navy regulations and train unqualified personnel, Plaintiff acted reasonably in filing complaints with the Office of the Inspector General and with the Office of Special Counsel.

24. On January 11, 1996, Plaintiff was discharged allegedly for using obscene language and medical inability to perform his duties. Plaintiff's discharge was retaliatory as Plaintiff was discharged for voicing and reporting violations of Navy instructions and/or regulations and for refusing to train unqualified personnel. No other reasonable cause or justification existed to discharge Plaintiff from his employment with the Navy.

25. By wrongfully discharging Plaintiff without cause or justification and for the retaliatory reasons set forth above, Defendant acted willfully and with malice toward Plaintiff.

26. Plaintiff has been damaged as a direct and proximate result of his wrongful and unlawful termination. Plaintiff has only recently been able to obtain another position. As a result he has suffered and continues to

suffer from lost salary and benefits, suffered and continues to suffer extreme mental stress, anxiety, depression, feelings of lack of self-worth, rejection and relegation to a second-class status due to the actions of the Defendant. In addition, as a result of the above mental stress damages, Plaintiff has been physically exhausted, run down and unable to lead life in a normal manner and has suffered aggravation of a preexisting medical condition

Second Claim for Relief

29 U.S.C. § 791

27. Plaintiff was, at all times mentioned herein, a qualified handicapped person within the meaning of Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and this handicap was known to Defendant.

28. Plaintiff, with or without a reasonable accommodation, could have continued to perform the essential functions of the position for which he had been hired.

29. Defendant refused to provide a reasonable accommodation to Plaintiff.

30. Defendant breached his obligation to Plaintiff to be a model employer of handicapped persons.

31. Defendant irrebuttably presumed that Plaintiff would be a safety hazard to himself and others in the job in question without undertaking the requisite examination of whether the asserted risks in fact were reasonably foreseeable or substantial.

32. Defendant failed to properly assess the essential functions of the jobs in question and to determine whether

Plaintiff could perform these functions with or without reasonable accommodation.

33. Defendant discharged Plaintiff in violation of the Rehabilitation Act of 1973 (29 U.S.C. § 790, et seq.).

34. Plaintiff has exhausted his administrative remedies.

35. Plaintiff was damaged by this violation of Section 501 in that he was caused to suffer discrimination based on his disability, emotional stress, loss of employment wages and benefits, and loss of opportunities for career advancement.

WHEREFORE, plaintiff prays that this Court enter an order finding as follows:

(a) That a declaratory judgement be issued that Plaintiff's rights have been violated as alleged above;

(b) That the Defendant be permanently enjoined to rehire Plaintiff;

(c) That Plaintiff have and recover from Defendant back salary, compensatory damages, statutory liquidated, exemplary and punitive damages, and such other monetary relief as may be deemed appropriate in amounts to be determined at trial, but in no event less than $500,000.

(d) That Plaintiff recover from Defendant prejudgment interest to the maximum extent permitted by law;

(e) That Plaintiff recover from Defendant his costs, including reasonable attorneys' fees together

with such other remedies as may be provided by law;

(f) And that the Court grant such other and further relief as it deems just and proper.

DATED: January 31, 1997

LAW OFFICES OF
JOHN F. SQUIRES

/s/ John F. Squires
JOHN F. SQUIRES
Attorney for Plaintiff,
David Schneider

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange and am over the age of eighteen (18), and not a party to the within action. I am employed by the Law Office of John F. Squires, 27281 Las Ramblas, Suite 200, Mission Viejo, California 92691.

I am familiar with the regular mail collection and processing practices of said business and, in the ordinary course of business, the mail is deposited with the United States Postal Service that same day.

On February 3, 1997, I served the within document entitled: **First Amended Complaint for Damages** by placing a true and correct copy thereof in a sealed envelope with postage for service by mail in the United States mail at Mission Viejo, California, addressed as follows:

Civil Process Clerk
United States Attorney
Central District of California, Civil Division
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 3, 1997, at Mission Viejo, California.

/s/ Patricia K. Squires
PATRICIA K. SQUIRES

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID SCHNEIDER, Plaintiff-Appellant, v. JOHN H. DALTON, SECRETARY OF THE NAVY, Defendant-Appellee.	No. 98-55281 D.C. No. CV 96-6665 MRP (MCx) MEMORANDUM [1] (Filed Nov. 30, 1999)

Appeal from the United States District Court
for the Cental District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted October 7, 1999
Pasadena, California

Before: RYMER and McKEOWN, Circuit Judges, and SHEA,[2] District Judge.

David Schneider appeals the district court's grant of summary judgment in favor of the Secretary of the Navy on Schneider's handicap discrimination claim brought pursuant to the Rehabilitation Act, 29 U.S.C. § 791 et seq., and the dismissal of his whistleblower retaliation claim

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[2] Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

brought as part of his mixed case complaint pursuant to 29 C.F.R. § 1614.302(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and remand in part.

We review de novo a district court's grant of summary judgment. *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). Schneider maintains that he is handicapped because his mental impairments, coupled with some physical limitations, substantially limit his ability to engage in the major life activity of working. "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice." *Sutton v. United Air Lines,* 119 S. Ct. 2139, 2151 (1999); *see also Broussard v. University of California,* 192 F.3d 1252 (9th Cir. 1999). Schneider has failed to demonstrate that his disability prevents him from working in a broad class of jobs. No material issue of fact exists as to Schneider's claim that he is handicapped; we therefore affirm the grant of summary judgment.

We also review de novo a district court's dismissal for lack of subject matter jurisdiction. *Crist v. Leippe,* 138 F.3d 801, 803 (9th Cir. 1998). In its motion to dismiss, the Navy argued that the district court did not have jurisdiction over the whistleblower claim because Schneider failed to bring his claim first to the Office of Special Counsel (OSC), notwithstanding Schneider's position that he had a "mixed case" complaint under the regulations, 29 C.F.R. § 1614.302. In supplemental briefing on appeal, the government concedes error with respect to the basis upon which it urged dismissal of the whistleblower claim. The government now acknowledges that Schneider did not fail

to exhaust his administrative remedies with the OSC and that a whistleblower claim coupled with a discrimination claim can be characterized as a "mixed case" complaint. Accordingly, we vacate the dismissal and remand. On remand, the district court will be free to consider whether the handicap claim was frivolous or simply unmeritorious. *See Afifi v. United States Dep't of the Interior,* 924 F.2d 61 (4th Cir. 1991) (dismissal of discrimination claim in mixed case does not automatically deprive district court of jurisdiction to hear nondiscrimination claim); *Mack v. United States Postal Serv.,* No. 92-CV-0068, 1998 WL 546624 at *5 (E.D.N.Y. Aug. 26, 1998). The district court also will be free to consider whether, assuming the whistleblower claim could be joined as part of a mixed case complaint, the Merit Systems Protection Board (MSPB) here lacked jurisdiction over such a claim at the time Schneider filed his EEO complaint. *See* 5 C.F.R. §§ 1201.22(b)(1), 1201.154(a) (thirty-day time limit for filing MSPB appeal).

AFFIRMED IN PART AND REMANDED IN PART. Each party to pay its own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID SCHNEIDER, Plaintiff, v. JOHN H. DALTON, SECRETARY OF THE NAVY, Defendant.	CV 96-6665 MRP (Mcx) ORDER (Filed Aug. 7, 2000)

Defendant's Motion to Dismiss came before the Court on July 10, 2000, the Honorable Mariana R. Pfaelzer presiding. Christopher Olmsted appeared for plaintiff David Schneider ("Schneider"). Assistant United States Attorney Sara Robinson appeared for defendant John Dalton, Secretary of the Navy ("Dalton"). The Court heard oral argument on defendant's Motion to Dismiss.

After consideration of the arguments presented and the pleadings and papers on file herein, it is hereby ORDERED that defendant's Motion to Dismiss is DENIED.

The Ninth Circuit reversed this Court's earlier ruling that it lacked subject matter jurisdiction over plaintiff's claims, but did not itself conclusively rule that subject matter jurisdiction exists. If Schneider properly brought a "mixed case complaint" as that term is defined in the regulations, 29 C.F.R. § 1614.302(a), the case falls within this Court's subject matter jurisdiction. 5 U.S.C. § 7702(e)(1). According to that provision, "A mixed case complaint is a complaint of employment discrimination filed with a Federal agency . . . related to or stemming

from an action that can be appealed to the Merit Systems Protection Board (MSPB)." 29 C.F.R. § 1614.302(a).

In its mandate, the Ninth Circuit stated that this Court is "free to consider whether the handicap[1] claim was frivolous or simply unmeritorious." Ninth Circuit Memorandum, citing *Afifi v. United States Dep't of the Interior*, 924 F.2d 61 (4th Cir. 1991). In *Afifi* the Fourth Circuit held, in dicta, that "a district court may dismiss an entire mixed case where it finds that plaintiff has engrafted a sham discrimination claim onto his complaint in order to defeat the Federal Circuit's jurisdiction." *Id.* (labeling such claims a "jurisdictional charade") However, if the original discrimination claim is not frivolous, a "mixed case" complaint can be brought and maintained in district court, even if the discrimination claim is ultimately unmeritorious. *See Id.*

The issue, then, is whether Schneider's original claim for handicap discrimination was frivolous. On September 15, 1997 the Court granted Dalton's motion for partial summary judgment on the handicap discrimination claim. The Ninth Circuit affirmed this ruling, reasoning that "Schneider has failed to demonstrate that his disability prevents him from working in a broad class of jobs. No material issue of fact exists as to Schneider's claim that he is handicapped." *Ninth Circuit Memorandum of 11/30/99*, 2.

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[1] The term "handicap" in the Rehabilitation Act and the Americans With Disability Act (ADA) has been changed to "disability," 29 U.S.C. § 706(8)(B). For purposes of this order, the term "handicap" will be used.

Afifi does not provide a test for distinguishing "sham discrimination claims" from legitimate claims. Dalton suggests that the Court use the test for determining frivolousness of a pleading in the context of deciding sanctions claims pursuant to Fed. R. Civ. P. 11.[2] Under Rule 11, by signing and submitting a pleading to Court, the signatory asserts that he (1) has read the document, (2) has performed a reasonable inquiry into the merits of the pleading and (3) is acting without an objectively improper motivation. See 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1335 (2d Ed. 1990) *citing Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986) *abrogated on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

Applying this rule to the instant case, the Court holds that Schneider's claim of discrimination was not frivolous under *Afifi*.[3] First, there is no dispute about whether Schneider read the document.

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[2] The Court borrows the Rule 11 test as a framework for deciding frivolousness under *Afifi* but does not mean to hold that the two tests are identical. For example, the Court does not reach the question of whether a frivolous claim under *Afifi* will automatically subject the filing attorney to sanctions under Fed. R. Civ. P. 11(c).

[3] The Court also considered the definition of "frivolousness" which governs the award of attorney's fees in discrimination cases. *See, e.g.* 29 U.S.C. § 794a(b) (providing fees to prevailing party under the Rehabilitation Act); 42 U.S.C. § 2000e-5(k) (same for Title VII). "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Under this test for frivolousness, and following the reasoning used to

(Continued on following page)

The second Rule 11 requirement is reasonable inquiry. By signing a filed document, an attorney certifies that "to the best of his knowledge, information and belief formed after reasonable inquiry, the signed document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Zaldivar*, 780 F.2d at 830-31 (paraphrasing Fed. R. Civ. P. 11(b)(2)).

Schneider's discrimination claim was dismissed through partial summary judgment, and that ruling was upheld by the Ninth Circuit. The Court now holds that although the discrimination claim was unmeritorious, its lack of merit was not so clearly apparent as to make unreasonable the filing of the complaint containing the claim. The key issue is whether Schneider was a handicapped person within the meaning of the Rehabilitation Act, which turns on whether his affliction substantially limited a "major life activity." 29 C.F.R. § 1614.203(a)(3). The Ninth Circuit noted that with respect to the major life activity of *working* the issue is whether Schneider's handicap precluded him from working in a broad class of jobs. *Ninth Circuit Memorandum of 11/30/99*, 2. The Ninth Circuit relied on recent Supreme Court and Ninth Circuit authority for this proposition, see *Sutton v. United Air Lines*, 119 S. Ct. 2139, 2151 (1999); *Broussard v. University of California*, 192 F.3d 1252 (9th Cir. 1999), which both construe the Americans With Disability Act, not the Rehabilitation Act. Although the two statutes are

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analyze the Rule 11 claim of frivolousness, *infra*, the Court finds that Schneider's claim for handicap discrimination to not be frivolous.

very similar,[4] the cases rely on language found in an ADA-related regulation[5] which is not found in Rehabilitation Act-related regulations.

Notwithstanding the lack of a clear regulation, at the time Schneider's complaint was filed a reasonable attorney would have found many cases that had applied the "broad class of jobs" requirement to the Rehabilitation Act. *See Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985). *See, also, Gupton v. Virginia*, 14 F.3d 203, 205 n.3 (4th Cir. 1994) (listing cases from other circuits). *But see Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993) (disagreeing with the rule implicitly but without comment). Nevertheless, there was no clear pronouncement from the Ninth Circuit or Supreme Court at that time that this requirement applied to the Rehabilitation Act.[6]

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[4] The Americans with Disabilities Act was enacted after the Rehabilitation Act and includes an identical definition of "disability". Compare 42 U.S.C. § 12102(2) (ADA definition) with 29 U.S.C. § 705(20)(B) (Rehabilitation Act definition). When drafting the ADA, Congress took the definition of disability directly from the Rehabilitation Act as amended in 1974. See Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition fo* [sic] *Disability*, 42 Vill. L. Rev. 409, 414-15 (1997).

[5] 29 C.F.R. § 1630.2(j)(3) ("With respect to the major life activity of *working* (i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. . . . ").

[6] A 1990 case from the Ninth Circuit, *Miller v. AT&T Network Sys.*, 915 F.2d 1404 (9th Cir. 1990) *aff'g and adopting the opinion of*

(Continued on following page)

In his opposition to Dalton's earlier motion to dismiss, Schneider also argued that he was limited by his handicap from major life activities such as "crossing freeway overpasses, walking up stairs and climbing on ladders". Although Schneider did not cite a single case which persuasively suggested that these alleged major life activities sufficed "[t]he question of who is a handicapped person under the Act is best suited to a 'case by case determination.'", *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100 (D. Hawaii 1980).

Schneider's claim for handicap discrimination has been deemed unmeritorious, and in the face of the then-existing case law this holding should have been unsurprising. Nevertheless, the Court holds that a competent attorney, after reasonable inquiry, could argue in favor of this claim in good faith.

The final requirement under Rule 11 is the purpose prong. An attorney represents by signing a pleading that "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). Dalton notes that the original district court complaint was filed without a claim for handicap discrimination. He also quotes from a colloquy between the Court and Schneider

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722 F.Supp. 633 (D.Or. 1989) (*"Miller District"*), is often cited as adopting the 'broad class of jobs' rule with respect to the Rehabilitation Act. *See, e.g., Gupton v. Virginia*, 14 F.3d 203, 205 n.3 (4th Cir. 1994). *Miller*, however, construes an Oregon state discrimination statute, O.R.S. 659.245, and not the Rehabilitation Act. *Miller District* at 639 (referring to federal case law in construing the state statute per the wishes of the Oregon legislature).

that preceded the decision to amend the complaint. *Defendant's Memorandum of Points & Authorities In Support of Motion to Dismiss*, 7-8. Schneider responds that handicap related claims were made in the original complaint before the EEO.

The colloquy does suggest that Schneider added this claim only when faced with the danger of losing subject matter jurisdiction in the District Court. This suggests that the claim was "engrafted" onto the complaint to manufacture jurisdiction.

The question presented is whether a claim which was clearly not frivolous based on legal merit can nevertheless be adjudged frivolous because it was brought to manufacture jurisdiction. The Court holds that this does not rise to the level of a "sham discrimination claim." The *Afifi* court referred specifically to complaints "where an appended discrimination claim is sham or frivolous." 924 F.2d at 63. This suggests a two-step analysis: First, the claim must be a "sham" claim. Second, it must be engrafted onto the complaint in order to defeat MSPB/Federal Circuit jurisdiction. In other words, the analysis of the merits is divorced from the analysis of the purpose. Despite evidence that the claim in this complaint was engrafted, the claim was not so unmeritorious as to rise to the level of a sham.

DATED: August 7, 2000

/s/ Mariana R. Pfaelzer
Hon. Mariana R. Pfaelzer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID SCHNEIDER, Plaintiff, v. **JOHN H. DALTON, SECRETARY OF THE NAVY,** Defendant.	CV 96-6665 MRP (Mcx) **ORDER OF DISMISSAL** (Filed Apr. 25, 2001)

On August 7, 2000, the Court denied Defendant's Motion to Dismiss the Complaint and Action for Lack of Subject Matter Jurisdiction, holding that a district court *can* retain subject matter jurisdiction over a proper 5 U.S.C. § 2302 nondiscrimination claim where that claim was originally "mixed" with a since-dismissed discrimination claim. While the Court stands by its earlier decision with respect to that general proposition, it has subsequently reviewed both the elaborate statutory framework of the Civil Service Reform Act ("CSRA") and plaintiff's specific actions with respect to exhaustion of his administrative remedies under the Act.

While a district court hearing a mixed case complaint may rule on any discrimination claims *de novo*, the court's role with respect to a nondiscrimination claim is limited: the court is to deferentially evaluate the decision rendered by the Merit Systems Protection Board ("MSPB"). If a plaintiff files suit before obtaining a ruling from the MSPB, that plaintiff has not exhausted his administrative remedies and there is nothing for the district court to decide.

Noting that Mr. Schneider failed to take up his case with the MSPB prior to the filing of this suit, and finding that the statute creates no private right of action for the plaintiff, the Court, acting on its own motion for reconsideration, hereby DISMISSES the action for lack of subject matter jurisdiction.

In its earlier remand, the Ninth Circuit alluded to a second issue not yet addressed by this Court: whether, according to the administrative scheme, plaintiff's nondiscrimination claim should have been brought before the MSPB or Equal Employment Opportunity Commission ("EEOC").

Schneider failed to exhaust his administrative remedies with respect to his nondiscrimination claim because he failed to appeal to the MSPB before filing this case in the District Court. *See Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998).

In *Sloan* an electronics technician, Wayne Sloan ("Sloan"), was fired from his job with the U.S. Army Corps of Engineers pursuant to Department of Defense regulations which limited some employees to a five year employment term. *Id.* at 1257. Sloan filed a barrage of complaints charging that the firing was improper and the result of racial animus. *See Id.* at 1257-58. These complaints were filed with a series of agencies and courts: the Army Equal Employment Office "(EEO"), an EEOC complaints examiner, an MSPB administrative law judge, the MSPB, the Court of Federal Claims, the United States District Court for the District of Hawaii and finally the Ninth Circuit Court of Appeals. *Id.*

In the *Sloan* opinion, the Ninth Circuit navigated the complex regulations governing mixed case complaints:

> An employee seeking to file a "mixed case complaint" may follow one of many possible administrative routes. First, he or she may initially file a complaint with the agency EEO, planning to appeal any unfavorable decision to the MSPB. Alternatively, he or she may bypass the EEO, and appeal the agency's action directly to the MSPB.

Id. at 1259-60 (footnotes omitted). The court continued:

> If a complainant wishes to preserve both claims, he or she must not pursue an appeal of the EEO decision with the EEOC. Rather, he or she must file the appeal with the MSPB, or be deemed to have waived the non-discrimination claim.

Id. at 1260.

Schneider filed a complaint first with the Navy EEO and then, after 180 days had elapsed without a final determination, with the district court. A complainant who has been affected by an action which can be appealed to the MSPB and who alleges discrimination prohibited by the Rehabilitation Act can appeal first to the acting agency. *See* 5 U.S.C. § 7702(a)(2); 29 C.F.R. 1614.302(b). If the agency does not act within the specified time, the complainant "shall be entitled to file a civil action." 5 U.S.C. § 7702(e)(1). *See* 29 C.F.R. § 1614.302(d)(1)(i); 29 C.F.R. § 1614.310(g). While this statutory and regulatory scheme clearly confirms that agency inaction constitutes exhaustion of administrative remedies with respect to a discrimination claim, it does not establish the same for personnel claims that are not based upon discrimination.

While a district court can rule *de novo* on discrimination claims brought as part of a mixed claim complaint,

the role of the district court with respect to nondiscrimination claims is limited. *See* 5 U.S.C. § 7703(c). Under section 7703, the district court does not consider nondiscrimination claims directly, but instead deferentially reviews decisions of the MSPB.

In the instant case, Schneider never sought administrative relief from the MSPB, and instead elected to sue directly in this Court. While a district court has jurisdiction over all *proper* claims in a mixed case complaint, including nondiscrimination personnel claims, 5 U.S.C. § 7702(e)(1)(A), it cannot have subject matter jurisdiction over a nondiscrimination claim that has not yet been administratively exhausted. *Cf. Sloan v. West*, 140 F.3d 1255, 1260 (9th Cir. 1998).

Nor can this Court treat plaintiff's claim as a private right of action under the CSRA. In *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988), the U.S. Supreme Court held that federal courts cannot fashion *Bivens* remedies where Congress appears to have intended to provide meaningful remedies within the existing administrative architecture:

> [T]he concept of 'special factors counseling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

The Ninth Circuit has consistently applied the *Chilicky* holding to Congressionally established remedial

schemes such as 5 U.S.C. §2302. *See, e.g., Collins v. Bender*, 195 F.3d 1076, 1078 (1999) ("[w]hen allegedly unconstitutional conduct falls within the broad confines of the CSRA, courts lack jurisdiction to hear a *Bivens* action based on the conduct"); *Saul v. United States*, 928 F.3d 829, 840 (9th Cir. 1991) (affirming the dismissal of a *Bivens* claim in light of the "comprehensive remedial provisions" of the CSRA).

While the Court dismisses the plaintiff's action in this forum, the Court renders no opinion as to whether the time that plaintiff has spent litigating this action in federal court might provide a ground for equitable tolling of plaintiff's original obligation to bring his case before the MSPB.

DATED: April 25, 2001 /s/ Mariana R. Pfaelzer
Hon. Mariana R. Pfaelzer
United States District Judge

Supreme Court U.S.
FILED
DEC 20 2002

No. 02-460

In the Supreme Court of the United States

DAVID SCHNEIDER, PETITIONER

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner filed this action in the district court, alleging that he was wrongfully removed from federal employment both because of employment discrimination and in retaliation for whistleblowing. The question presented is whether the courts below properly concluded that petitioner's nondiscrimination whistleblower-retaliation claim should be dismissed because he never presented that claim to the Merit Systems Protection Board.

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In the Supreme Court of the United States

No. 02-460

DAVID SCHNEIDER, PETITIONER

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter, but is reprinted in 40 Fed. Appx. 575. The order of the district court (Pet. App. 24-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2002. The petition for a writ of certiorari was filed on September 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1990 to 1996, petitioner worked for the aircraft maintenance department of a Navy facility in

California. In January 1996, he was removed for medical inability to perform his duties and for the use of foul and abusive language in the workplace. C.A. Suppl. Excerpts of Record (SER) 7-11. In February 1996, petitioner filed an administrative complaint with the Equal Employment Opportunity (EEO) component of his agency, alleging that the Navy discriminated against him because of a mental disability (depression) and fired him in retaliation for reporting safety violations. *Id.* at 14-16. In June 1996, the Navy notified petitioner that it accepted and would investigate his claim of discrimination and retaliatory removal. *Id.* at 23-32.

The Navy's notice stated that petitioner's administrative complaint was a "mixed case complaint," because it raised a claim of employment discrimination together with a personnel action--petitioner's removal --that is appealable to the Merit Systems Protection Board (MSPB). C.A. SER 29; see 29 C.F.R. 1614.302(a) ("A mixed case complaint is a complaint of employment discrimination filed with a Federal agency * * * related to or stemming from an action that can be appealed to the Merit Systems Protection Board."). The notice also quoted at length from regulations governing administrative processing and judicial review of mixed case complaints. See C.A. SER 29-30 (quoting 29 C.F.R. 1614.302(a), (b) and (d); 5 C.F.R. 1201.154(a)).

2. In September 1996, after more than 120 days elapsed without a decision on petitioner's formal EEO complaint, he filed this action against the Secretary of the Navy in district court. See 5 U.S.C. 7702(a)(2) and (e)(1). The complaint alleged that petitioner was wrongfully discharged in retaliation for reporting safety violations, in violation of the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8), and based

on disability, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* Pet. App. 10-11.

The district court dismissed petitioner's disability claim for failure to establish a prima facie case of discrimination, and dismissed his whistleblower-retaliation claim for lack of subject matter jurisdiction because petitioner failed to exhaust his administrative remedies before the Office of Special Counsel (OSC). See 5 U.S.C. 1211. The court of appeals affirmed the dismissal of the discrimination claim, but vacated the dismissal of the whistleblower claim and remanded. Pet. App. 14-16. The court noted that the Navy conceded that petitioner was not required to exhaust his administrative remedies with the OSC, but emphasized that on remand the district court would be free to consider other factors affecting the existence of subject matter jurisdiction over the whistleblower claim. *Id.* at 15-16.

3. On remand, the district court held that, although petitioner's discrimination claim was dismissed, this action still qualified as a mixed case for purposes of conferring subject matter jurisdiction over a proper nondiscrimination claim, because petitioner's discrimination claim (though meritless) was not frivolous. Pet. App. 17-23. But in a subsequent ruling (*id.* at 24-28), the district court held that this case does *not* present a proper nondiscrimination claim, because petitioner "failed to exhaust his administrative remedies with respect to his nondiscrimination claim" by not "appeal[ing] to the MSPB before filing this case in the District Court." *Id.* at 25; see *id.* at 27. Accordingly, the court dismissed the action. *Id.* at 25, 28.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1-2. The court stated: "There can be no doubt that [petitioner] failed to present his

whistleblower retaliation claim to the [MSPB] before he brought his mixed claim action in the district court. Thus, he has not preserved that claim for judicial review." *Id.* at 2. The court further noted that "when an employee bypasses the MSPB, federal courts cannot possibly apply the proper deferential standard of review to the agency's action on a nondiscrimination claim." *Ibid.* (footnote omitted).

ARGUMENT

The court of appeals correctly concluded that petitioner's whistleblower-retaliation claim should be dismissed. Its unpublished decision presents no conflict of authority warranting review by this Court. The petition should be denied.

1. a. The Civil Service Reform Act of 1978 (CSRA) forbids an agency from engaging in certain personnel practices, including unlawful discrimination and reprisal against so-called whistleblowers. 5 U.S.C. 2302. When an alleged prohibited practice involves certain "major" adverse personnel actions, such as removal, see 5 U.S.C. 4303, 7512, an employee has a right to appeal the action to the MSPB. 5 U.S.C. 7513(d); 5 C.F.R. 1201.3. For less severe personnel actions, such as reassignments, see 5 U.S.C. 2302(a)(2), the employee must petition the Office of Special Counsel (OSC) to investigate and seek corrective action. See 5 U.S.C. 1211-1216. If the OSC concludes that there is a prohibited personnel practice and the employing agency does not take timely corrective action, the Special Counsel may then petition to the MSPB. 5 U.S.C. 1214(b)(2)(C); 5 C.F.R.1201.2(a); see also 5 C.F.R. 1201.121-1201.129.

An employee who is adversely affected or aggrieved by a final order or decision of the MSPB may seek judicial review of that order. 5 U.S.C. 7703(a)(1). In

most, but not all, cases, the employee may obtain such judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b)(1). The Federal Circuit reviews the administrative record, and may not overturn the decision of the MSPB unless it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise contrary to law. 5 U.S.C. 7703(c).

Whistleblowers have certain additional options. For a whistleblower-retaliation claim involving a nonappealable personnel action, the employee must petition the OSC first, but if the Special Counsel does not seek corrective action or act within 120 days, the employee himself may seek corrective action before the MSPB. 5 U.S.C. 1214(a)(3); 5 U.S.C. 1221(a); 5 C.F.R. 1209.2(b)(1); 5 C.F.R. 1209.5(a). An employee claiming whistleblower retaliation involving an *appealable* personnel action may go to the OSC first, or appeal directly to the MSPB. 5 U.S.C. 1221(b); 5 C.F.R. 1209.2(b)(2). An employee adversely affected by a final order or decision of the MSPB under the whistleblower provisions may obtain judicial review by a petition for review "as provided under [5 U.S.C. 7703(b)]." 5 U.S.C. 1221(h).

b. Typically when a federal employee claims employment discrimination, he must exhaust administrative remedies as a precondition to filing suit in district court by filing a formal complaint with his agency's Equal Employment Opportunity office. See 42 U.S.C. 2000e-16(c); 29 C.F.R. 1614.105-1614.108; *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 832 (1976). The employee may seek judicial review of a final agency decision, 42 U.S.C. 2000e-16(c), 29 C.F.R. 1614.407(a) and (b), which a district court considers de novo. *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). Alternatively, the employee

may appeal the agency decision to the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. 1614.401(a). The employee may then seek de novo review in the district court following a final decision of the EEOC, 29 C.F.R. 1614.407(c), or if the EEOC fails to issue a final decision within 180 days of the appeal. 29 C.F.R. 1614.407(d).

Mixed cases blend the administrative and judicial review procedures for personnel actions that are appealable to the MSPB, and the procedures for employee discrimination claims. Congress specifically designed mixed-case procedures to ensure that the MSPB "will continue to consider all actions appealable under the other provisions of [the CSRA], even if the appeal also involves issues of discrimination." S. Rep. No. 969, 95th Cong., 2d Sess. 53 (1978). As one Committee Report explains:

> Any provision denying the Board jurisdiction to decide certain adverse action appeals because discrimination is raised as an issue would make it impossible for the government to have a single unified personnel policy which took into account the requirements of all the various laws and goals governing Federal personnel management. In the absence of full Board jurisdiction, forum shopping and inconsistent decisions, perhaps arising out of the same set of facts, would result.

Ibid. "At the same time," the mixed-case provisions preserve the EEOC's authority to set "general policy rules and directions" over "questions of discrimination." *Ibid.*; see also H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 139 (1978).

Congress also has preserved a federal employee's existing right to de novo review in district court of

proper discrimination claims that are administratively exhausted. See H.R. Conf. Rep. No. 1717, *supra*, at 139 (the conference bill "protects the existing rights of an employee to trial de novo under the Civil Rights Act after a final agency action or if there is no administrative decision after a specified number of days"); *id.* at 141 (the conference bill "fully protects the existing rights of employees to trial de novo under title VII of the Civil Rights Act of 1964 or other similar laws after a final agency action on the matter").

c. Under the mixed-case procedures, an employee alleging that a personnel action appealable to the MSPB (*e.g.*, removal) was based on prohibited discrimination may initiate administrative review either by filing a "mixed case complaint" with his agency's EEO office, or by filing a "mixed case appeal" with the MSPB. 5 U.S.C. 7702; 29 C.F.R. 1614.302(a) and (b); see 5 C.F.R. 1201.151.

(i). When the employee elects to file a "mixed case appeal" with the MSPB, the MSPB is required to decide both the issue of discrimination and the appealable personnel action within 120 days. 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.156(a). The employee may then either seek immediate judicial review of an adverse MSPB decision in district court, 5 U.S.C. 7702(a)(3), 7703(b)(2), or first ask the EEOC to review the discrimination issue, 5 U.S.C. 7702(a)(3) and (b), and issue a decision that may become final and judicially reviewable. When the mixed-case decision reaches district court (with or without intermediate presentation to the EEOC), the court reviews the discrimination claim de novo, and the personnel claim based on the administrative record, in the same manner that it would be reviewed by the Federal Circuit in an unmixed case. 5 U.S.C. 7703(c)(1)-(3).

The employee's right to seek *prompt* de novo judicial review of a discrimination claim under the civil rights laws is preserved if there is no final, judicially reviewable administrative decision within 120 days of filing a mixed-case appeal with the MSPB, or within 180 days of filing a petition asking the EEOC to review the MSPB decision (if a petition is filed). In such a case, after the passage of the relevant time period, the employee "shall be entitled to file a civil action to the same extent and in the same manner as provided in" Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), and certain other antidiscrimination laws. 5 U.S.C. 7702(e)(1)(B) and (C).

(ii). If—instead of initiating the administrative process with a "mixed case appeal" to the MSPB—the employee elects to begin with a "mixed case complaint" to his employing agency, 29 C.F.R. 1614.302(a), as petitioner did here, the agency processes the complaint in the same manner as EEO complaints generally. See 29 C.F.R. 1614.302(d). However, unlike an "unmixed" EEO claim, which the employee may appeal to the EEOC for an administrative hearing, the employee may appeal a mixed-case action to the MSPB if there is either an adverse decision or no judicially reviewable agency action on the complaint within 120 days. 5 U.S.C. 7702(e)(2); 29 C.F.R. 1614.302(d)(2); cf. 29 C.F.R. 1614.108(f). The MSPB considers both the appealable personnel action and the EEO allegation in accordance with the procedures described above for mixed-case appeals (including the procedures for a petition to the EEOC on disputed discrimination issues). A final MSPB decision is judicially reviewable as above; the district court reviews the personnel action on the administrative record and the discrimination claim de novo.

If the employee elects not to appeal the agency's decision on a mixed-case complaint to the MSPB, the agency decision becomes final and reviewable in district court. 5 U.S.C. 7702(a)(2) ("[T]he decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board."). However, because there has been no administrative exhaustion of the nondiscrimination personnel claim, if the employee elects to bypass the MSPB and go directly to court at this point, the personnel claim is abandoned and the district court has jurisdiction only over the discrimination claim, which it reviews de novo. The same rule applies if the agency fails to issue a final, judicially reviewable decision within 120 days from the filing of a mixed-case complaint and the employee brings suit on his discrimination claim directly in district court. 5 U.S.C. 7702(e)(1)(A).

2. Under the foregoing principles, the courts below properly concluded that the district court lacked subject matter jurisdiction over petitioner's whistleblower-retaliation claim.

As discussed, petitioner brought a mixed case claiming that he was discharged for whistleblowing and because of disability discrimination. Termination in retaliation for whistleblowing is a personnel action that is appealable to the MSPB. 5 U.S.C. 7702(a)(1)(A); 5 U.S.C. 1221. Petitioner elected to file a "mixed case complaint" with his agency EEO office, and when he received no final, judicially reviewable action on the complaint within 120 days, he filed this suit in district court. This case thus falls within 5 U.S.C.

7702(e)(1)(A),[1] the only provision that authorizes suit in such circumstances, and the only claim over which the district court had subject matter jurisdiction was petitioner's disability discrimination claim. By electing to file suit in district court on his discrimination claim, petitioner waived his nondiscrimination claim.

The provision on which the courts and parties focused below—5 U.S.C. 7702(a)(2)—does not authorize this suit because that provision is triggered by "[t]he decision of the agency," and there was no agency decision in this case. The courts below did not consider the applicability of Section 7702(e)(1)(A). Nevertheless, the plain language of that provision, and the statutory scheme governing mixed cases as a whole, make clear that the courts below correctly held that petitioner's failure to present his whistleblower-retaliation claim to the MSPB before filing this suit deprived the district court of jurisdiction to entertain it.

Petitioner's discrimination claim arises under the Rehabilitation Act of 1973. See Pet. App. 3. Section

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[1] 5 U.S.C. 7702(e)(1)(A) provides in pertinent part:

> (e)(1) Notwithstanding any other provision of law, if at any time after—
>
> > (A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal [to the MSPB under § 7702(e)(2)]
> >
> > * * * * *
>
> an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

505 of that Act, 29 U.S.C. 794a, incorporates the judicial review provisions of Title VII, 42 U.S.C. 2000e-16(c). Accordingly, petitioner's right under 5 U.S.C. 7702(e)(1)(A) to file a civil action when his agency did not act within 120 days following the filing of his mixed-case complaint exists only "to the same extent and in the same manner as provided in" Section 2000e-16(c). Section 2000e-16(c) does not confer subject matter jurisdiction over personnel actions appealable to the MSPB under the CSRA. Nor does anything in the CSRA contemplate *de novo* judicial review (*i.e.*, the kind of judicial review provided by Title VII) for a personnel action appealable to the MSPB, which under the CSRA is judicially reviewable only on an *administrative record.*

Instead, in establishing mixed-case procedures within the comprehensive and exclusive remedial scheme of the CSRA, Congress intended that "[u]nder the procedures adopted," the MSPB "will continue to consider *all*" appealable personnel actions, "even if" the case "also involves issues of discrimination," to preserve the MSPB's assigned role of ensuring that the government will "have a single unified personnel policy which [takes] into account the requirements of all the various laws and goals governing Federal personnel management." S. Rep. No. 969, *supra*, at 53 (emphasis added). In providing an option for a mixed-case complainant to take his *discrimination* claim to district court without awaiting exhaustion on the personnel action in an appeal to the MSPB, Congress sought to preserve the employee's existing judicial review rights *under the civil rights laws*, not to displace the role of the MSPB under the CSRA to adjudicate disputes concerning major personnel actions and thus establish a uniform federal personnel policy.

In a case such as this in which the employee's right to obtain prompt judicial review of a discrimination claim is in tension with the policy favoring review of ordinary personnel actions on the agency record, the statute gives the employee the option of pressing his personnel-action claim or obtaining prompt review of the discrimination claim. Having chosen the latter, and having had the discrimination claim rejected by the courts, petitioner cannot resurrect the personnel-action claim. Accordingly, petitioner's whistleblower-retaliation claim was properly dismissed for lack of subject matter jurisdiction, where petitioner failed to seek MSPB review of that claim, and thus did not create the necessary administrative record for judicial review of that claim.

3. The result would be no different if 5 U.S.C. 7702(a)(2) were applicable here. Section 7702(a)(2) provides that when an employee elects to bring his claims as a mixed-case complaint to his agency EEO office, "the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the [MSPB]." Pointing to *Doyal* v. *Marsh*, 777 F.2d 1526, 1530 n.1 (11th Cir. 1985), and *Wells* v. *Shalala*, 228 F.3d 1137, 1142-1143 (10th Cir. 2000), petitioner argues (Pet. 7-8) that the plain language of Section 7702(a)(2) provides that following the agency decision, the employee "may *either* immediately file suit in a district court *or* pursue an administrative procedure." But nothing in Section 7702(a)(2) speaks to which *issues* are preserved if the employee elects immediate district court review without first presenting his nondiscrimination claims to the MSPB.

Petitioner and the decisions on which he relies assume that district court review in these circum-

stances must encompass *both* the discrimination claim, which has been administratively exhausted under CSRA, *and* the personnel action, which has *not* been exhausted as required under the CSRA. Petitioner reasons (Pet. 9) that if judicial review did not extend to both of those components the employee would be forced "to bifurcate his case and return to the administrative process for further consideration of his [nondiscrimination] claim." See *Wells*, 228 F.3d at 1143; *Doyal*, 777 F.2d at 1536-1537; *Quinn* v. *West*, 140 F. Supp. 2d 725, 734 (W.D. Tex. 2001). But properly viewed, the employee's mixed case is never bifurcated in these circumstances. Rather, if he elects not to exhaust administrative review before the MSPB of his appealable personnel action in order to pursue his right to immediate judicial review under the civil rights laws, he has waived further review of the personnel action *in any forum*. See *Sloan* v. *West*, 140 F.3d 1255, 1260 (9th Cir. 1998); *Nater* v. *Riley*, 114 F. Supp. 2d 17, 24 (D.P.R. 2000).

That is the necessary implication of the entire CSRA statutory scheme for mixed cases, considered as a whole. As discussed, Congress intended that in order to maintain uniform federal personnel policy, the MSPB would consider *"all"* appealable personnel actions, "even if" issues of discrimination are involved. S. Rep. No. 969, *supra*, at 53 (emphasis added); see 5 U.S.C. 7513(d); 5 U.S.C. 7702(a)(1). That includes appealable personnel actions involving whistleblower claims. 5 U.S.C. 1221.

Moreover, Congress provided that judicial review of final decisions of the MSPB would be subject to deferential review on the MSPB record, and that the decision of the MSPB would not be overturned unless it is arbitrary, capricious, unsupported by evidence, or

contrary to law. 5 U.S.C. 7703. And, while Congress preserved an employee's right under the civil rights laws to seek immediate de novo district court review of a *discrimination* claim that has been administratively exhausted, Congress did *not* confer subject matter jurisdiction in such cases over a *non*discrimination claim brought as part of a "mixed case" that has not been exhausted before the MSPB. See 5 U.S.C. 7702(e)(1)(A), (B) and (C) (authorizing employee to file a civil action "to the same extent and in the same manner as provided in" Title VII where there is no administrative action within a specified time).

The decisions cited by petitioner from other courts of appeals do not address the statutory arguments discussed above and, in particular, do not discuss what standard of review the district court could apply in reviewing a personnel action without the benefit of the record of an adjudication by the MSPB or indeed, as in this case, without the benefit of any administrative record. See *Wells*, 228 F.3d at 1142-1143; *Doyal*, 777 F.2d at 1535-1537; *Quinn*, 140 F. Supp. 2d at 734. Thus, even if those decisions were on point, they would create no direct conflict with the decision in this case warranting this Court's review. In any event, the court of appeals' per curiam decision in this case was unpublished (see Pet. App. 1 n.*) and therefore could not contribute to any alleged conflict. Further review in this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

DAVID SCHNEIDER,

Petitioner,

vs.

GORDON R. ENGLAND, SECRETARY OF THE NAVY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The decision by the United States Court of Appeals for the Ninth Circuit creates an intercircuit conflict which threatens the consistency of federal law. The brief for the Respondent confirms the existence of this intercircuit conflict. Resolution by this Court is critical in achieving a uniform procedure in "mixed cases," involving both whistleblower retaliation and discrimination claims.

LEGAL DISCUSSION

The plain statutory language of 5 U.S.C. § 7702 establishes that following an adverse agency decision, the employee has the option in a "mixed case" complaint of filing a civil action in the district court rather than appealing to the Merit System Protection Board ("MSPB"). This is so because the statute provides, "[t]he decision of the agency in any such matter shall be a judicially reviewable action *unless* the employee appeals the matter to the [Merit Service Protection] Board." 5 U.S.C. § 7702, subd. (a)(2)(B), emphasis added.

Prior to the Ninth Circuit Court of Appeals' decision, every other court to consider application of this section has followed the statute's plain meaning. See, e.g., *Wells v. Shalala,* 228 F.3d 1137, 1142 (10th Cir. 2000); *Mullins v. Cromwell,* 228 F.3d 1305, 1312 (11th Cir. 2000); *Doyal v. Marsh,* 777 F.2d 1526, 1535-1536 (11th Cir. 1985); *Quinn v. West,* 140 F.Supp.2d 725, 734 (W.D. Tex. 2001).

Legal commentators have likewise uniformly interpreted the statute by applying its plain meaning. See, e.g., Burdens of Proving Handicap Discrimination Using Federal

Employment Discrimination Law: Rational Basis or Undue Burden, 1989 Det. C.L. Rev. 1053, 1071 ("When an employee presents a claim of discrimination before the district court, the court has jurisdiction over the civil service claim even if the civil service claim has not been presented to the [Merit System Protection] Board").

In reliance upon the express statutory language, the statute's uniform interpretation by courts, and the statute's uniform interpretation by commentators, Petitioner David Schneider filed his mixed case complaint in the district court after the Navy Equal Employment Office failed to issue a timely determination of his action. In contradistinction to every other court which has considered this issue, the Ninth Circuit Court of Appeals resolved that Petitioner had failed to exhaust his administrative remedies. The Court then buried its decision in a two-page unpublished memorandum decision. Pet. App. 1-2.

Respondent acknowledges that the legal authority cited by Petitioner holds the "district court review in these circumstances must encompass *both* the discrimination claim, which has been administratively exhausted under [the Civil Service Reform Act], *and* the personnel action, which has *not* been exhausted as required under the CSRA." Opp. 14-15, original emphasis. Respondent nonetheless maintains that the decisions cited by Petitioner are wrong.[1] Opp. 14-16.

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[1] For example, Respondent observes, "[t]he decisions cited by petitioner from other courts of appeals do not address the statutory arguments discussed above and, in particular, do not discuss what

(Continued on following page)

Respondent is mistaken. As explained in the petition, the conclusion that an appeal to the MSPB is not a prerequisite to filing an action in the district court makes sense. As the court of appeals recognized in *Christo v. Merit Systems Protection Board,* 667 F.2d 882, 883 (10th Cir.1981), "the various statutory provisions of the Act and its legislative history indicate a clear Congressional preference for combining various aspects of a single agency determination under one review proceeding, both in the administrative and judicial channels." See also *Wall v. United States*, 871 F.2d 1540, 1545-46 (10th Cir.1989) (Seymour, J., dissenting) (To obtain judicial review in a "mixed case," an employee may file suit in federal district court after final agency action, "whether the final agency action consists of resolution of a mixed case by the Board, or rejection of the claim by claimant's agency").

To force a plaintiff to bifurcate his case and return to the administrative process for further consideration of his retaliation claim would frustrate principles of judicial economy and serve no useful purpose. See *Woodman v. Runyon,* 132 F.3d 1330, 1342 (10th Cir.1997); cf. *Tolliver v. Deniro,* 790 F.2d 1394, 1396 (9th Cir. 1986) (For reasons of judicial economy, interests of the litigants and legislative history, the Court of Appeals refused to bifurcate improper discharge claims from racial discrimination claims).

As Respondent confirms, Congress intended to create a uniform federal procedure for personnel actions. Here,

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standard of review the district court could apply in reviewing a personnel action wihout the benefit of the record or an adjudication by the MSPB or indeed, as in this case, without the benefit of any administrative record." Opp. 16.

the Ninth Circuit has diverged from it. The published decisions from the Tenth and Eleventh Circuits, as well as from the district court in the Fifth Circuit, have uniformly authorized employees – following rejection of a mixed case complaint by the employing agency – to file civil actions in the district court rather than first appealing to the MSPB. If these courts are wrong, this Court must tell employees what the law is. If these courts are right, then Petitioner's right to due process and fundamental fairness have been violated by a rogue Ninth Circuit Court of Appeals' unpublished memorandum decision which has reached a contrary resolution. Again, this Court must speak.

In sum, this Court should grant certiorari to resolve the intercircuit conflict and eliminate uncertainty in the interpretation of 5 U.S.C. § 7702. See, e.g., *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602 (2001) (Certiorari granted to review unpublished *per curiam* opinion to resolve intercircuit conflict).

CONCLUSION

For the reasons set forth in the petition and in this reply, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: January 3, 2003

Respectfully submitted,

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